No. 00-56330

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER P. BLAXLAND; MARCELLA BLAXLAND
Plaintiffs-Appellees,

v.

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS; AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION,
Defendants-Appellants.

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF REVERSAL

ON APPEAL FROM THE DENIAL OF DEFENDANT-APPELLANTS' MOTION TO DISMISS ON THE GROUND OF IMMUNITY FROM SUIT ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, THE HONORABLE MANUEL L. REAL, JUDGE

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STATEMENT OF QUESTION PRESENTED

Whether, under the Foreign Sovereign Immunities Act, the Commonwealth of Australia is subject to suit in United States courts on claims arising from the arrest and extradition of plaintiff pursuant to a treaty of extradition between the United States of America and the Commonwealth of Australia.

INTEREST OF THE UNITED STATES

The United States has treaties of extradition with numerous foreign countries, including Australia, pursuant to which the United States will assist a requesting nation to obtain the extradition of individuals with respect to whom there is probable cause to believe they have committed an extraditable offense. In addition, these treaties allow the United States to seek the

assistance of foreign governments to obtain the extradition of persons charged with crimes in the United States.

The district court held that foreign states that invoke their rights under extradition treaties thereby subject themselves to suit in the courts of the United States. This decision is inconsistent with Congress's grant to foreign governments, in the Foreign Sovereign Immunities Act, of immunity for their public acts. If upheld, the district court's opinion will disrupt the normal functioning of our extradition treaties with foreign states and, if followed abroad, subject the United States to suit in foreign courts for the exercise of its sovereign prosecutorial function.

STATEMENT OF THE CASE

1. Plaintiff Christopher Blaxland is an Australian citizen and legal resident of the United States, living in California, since 1986. Amended Complaint (Amend. Compl.) ¶¶ 1, 25.[1] In 1991, Blaxland was charged in Australia with securities fraud. Id. ¶ 15. In 1995, Blaxland failed to appear for trial, and the Australian court issued a warrant for Blaxland's arrest. Id. ¶ 19. Australia's Commonwealth Director of Public Prosecutions ("DPP") requested, through the U.S. State Department, that the United States assist in obtaining Blaxland's extradition. Id.

[1] The Amended Complaint is reproduced at pp. 188-206 of the Excerpts of Record (E.R.). For purposes of this appeal, the United States accepts as true the allegations of plaintiffs' Amended Complaint.

¶ 22. Pursuant to a treaty of extradition between the United States and Australia and the United States extradition statute, 18 U.S.C. § 3184, the United States Attorney's office for the Central District of California filed a complaint for extradition in the United States District Court. Amend. Compl. ¶ 23. A Magistrate Judge ordered that Blaxland be arrested, id. ¶ 26, and, after a hearing, the district court concluded that there was probable cause to believe that Blaxland had committed the crime for which he was charged, id. ¶ 37. Based upon this ruling, Blaxland was extradited to Australia. Id. ¶ 37-38. Blaxland stood trial in Australia and was acquitted. Id. ¶ 43.

2. When Blaxland returned to California, he filed suit in Los Angeles superior court against Shaw, the DPP, the Australian Securities and Investment Commission ("ASIC"), Dennis T. Barry, the official from ASIC who signed the information leading to Blaxland's indictment, id. ¶ 15, and 50 unnamed John Does. The named defendants are Australian governmental entities and officials of these entities. Id. ¶¶ 3-6. The complaint alleges that Shaw and Barry provided false information to the United States Attorney and submitted false or misleading statements in affidavits submitted to the district court in order to secure Blaxland's arrest and extradition. Id. ¶¶ 23-25, 35-36. Blaxland also alleges that defendants wrongfully opposed his bail applications both in the United States and Australia in an effort to coerce Blaxland into accepting a plea agreement. Id. ¶¶ 29-

31, 38. The Complaint asserts causes of action for "malicious prosecution," "abuse of process," "intentional infliction of emotional distress," "false imprisonment," and, on behalf of Blaxland's wife, "loss of consortium" and "intentional infliction of emotional distress." E.R. at 198-206.

Defendants removed the case to federal district court and filed a motion to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 ("FSIA"). At the conclusion of a hearing on defendants' motion to dismiss, the district court granted the motion as to the individual named defendants, but denied the motion as to the governmental entities. See E.R. 228 (Transcript of Hearing), 230-32 (Order). The district court did not explain the basis for its ruling. See ibid.

The DPP and ASIC appealed the district court's denial of their motion to dismiss pursuant to the collateral order doctrine announced in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). See Compania Mexicana de Aviacion, S.A. v. United States District Court for the Central District of California, 859 F.2d 1354, 1358 (9th Cir. 1988) (applying Cohen to denial of immunity under the FSIA).[2]

[2] The Blaxlands have also appealed from the district court's dismissal of the claims against the individual officials. The United States does not address issues specific to the cross-appeal in this brief.

SUMMARY OF ARGUMENT

The courts of the United States may assert jurisdiction over claims against foreign sovereigns only in circumstances that fall within one of the exceptions specified by Congress in the Foreign Sovereign Immunities Act. Plaintiffs' claims fall within no exception to the general rule of foreign governmental immunity and, thus, are barred. In the district court, plaintiffs purported to base jurisdiction upon two statutory exceptions, neither of which is availing.

Plaintiffs' reliance upon the non-commercial tort exception, paragraph (a)(5), is without foundation. Indeed, that section expressly provides that the non-commercial tort exception does not extend to claims arising out of alleged malicious prosecution and abuse of process. It thus specifically precludes the very claims that plaintiffs here assert. Each of plaintiffs' claims is merely a reformulation of their basic assertion – that the defendants provided false information to the courts in order to obtain Blaxland's arrest and extradition. Plaintiffs cannot circumvent the explicit statutory preclusion of their claim by attaching a variety of labels to their contentions.

Plaintiffs' reliance upon the FSIA's waiver provision is also misplaced. The courts of appeals, including this Court, have clearly held that a waiver of immunity must be intentionally made. Here, plaintiffs argue that a waiver of immunity can be discerned from defendants' participation in extradition

proceedings before a United States court. Defendants' actions simply do not support a finding of an intentional waiver. Indeed, plaintiffs' waiver argument runs directly contrary to Congress's determination, discussed above, to preserve foreign states' immunity from claims for alleged malicious prosecution and abuse of process before U.S. courts. Even apart from this fundamental legal flaw, plaintiffs cannot show an intentional waiver on the basis of these facts. Australia did not invoke the jurisdiction of the United States courts to decide a legal claim. Rather, Australia merely filed an extradition request with the State Department, invoking Australia's rights under a treaty of extradition to have Blaxland returned to Australia to stand trial before Australian courts. To find an intentional waiver of immunity in this case would seriously complicate the smooth functioning of our system of extradition treaties.

ARGUMENT

PLAINTIFFS' CLAIMS AGAINST THE COMMONWEALTH OF AUSTRALIA DO NOT FALL WITHIN ANY EXCEPTION TO THE BROAD IMMUNITY GRANTED FOREIGN GOVERNMENTS BY THE FOREIGN SOVEREIGN IMMUNITIES ACT.

A. Background Of U.S. Sovereign Immunity Practice.

The United States has approached the question of foreign sovereign immunity in three distinct periods. In the first period (from about 1812 to 1952), the United States granted foreign sovereigns virtually "absolute" immunity from suit in United States courts. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983) (citing The Schooner Exchange

v. M'Fadden, 11 U.S. (7 Cranch) 116, 136-37 (1812)). During this first period, the courts deferred to the views of the Executive Branch on whether to exercise jurisdiction, and the State Department "ordinarily requested immunity in all actions against friendly foreign sovereigns." Id. at 486.

In 1952, United States practice concerning foreign sovereign immunity entered a second phase when the Executive Branch formally adopted the "restrictive" theory of immunity in the "Tate letter." See Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711-15 (1976) (reprinting the "Tate letter"). In that letter, the State Department announced that it would henceforth recommend to United States courts, as a matter of policy, that foreign states be granted immunity only for their sovereign or public acts (jure imperii), and not for their private or commercial acts (jure gestionis). See Verlinden B.V., 461 U.S. at 486-87. As explained in the Tate letter, the adoption of the restrictive theory reflected the increasing acceptance of that theory by foreign states, as well as the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." Alfred Dunhill of London, 425 U.S. at 714.

Foreign sovereign immunity practice entered its third (and current) phase when Congress enacted the FSIA, which became effective in January, 1977. Pub. L. No. 94-583, 90 Stat. 2891

(1976) codified at 28 U.S.C. §§ 1330, 1602, et seq. The FSIA, "[f]or the most part, codifies, as a matter of federal law, the restrictive theory of sovereign immunity." Verlinden B.V., 461 U.S. at 488. See also H.R. 1487, 94th Cong., 2d Sess., 7 (Sept. 9, 1976), reprinted in 5 U.S.C.C.A.N. 1976, 6604, 6605 (FSIA intended to "codify the so-called 'restrictive' principle of sovereign immunity," under which "the immunity of a foreign sovereign is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)"). The FSIA contains a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." Verlinden B.V., 461 U.S. at 488. The Act sets forth a general rule of foreign state immunity, 28 U.S.C. § 1604, and provides for specific exceptions to that immunity rule, id. §§ 1605-07. If the FSIA applies, it controls, since the Supreme Court has made unequivocally clear that the FSIA "'provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.'" Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989)).

Plaintiffs have argued that the district court had jurisdiction under the waiver and non-commercial tort exceptions to the FSIA's grant of immunity. See 28 U.S.C. § 1605(a)(1),

(5).[3] As we demonstrate below, neither exception applies to this case. Thus, plaintiffs' claims against the Commonwealth of Australia and its agencies and instrumentalities must be dismissed.

B. Plaintiffs' Claims Cannot Be Brought Under Paragraph (a)(5) Because Congress Has Preserved Foreign States' Immunity For Claims Arising Out Of Quintessentially Public Acts Such As Extradition And Prosecution.

Paragraph (a)(5) of Section 1605 establishes an exception to the general rule of foreign governmental immunity for claims based upon non-commercial tortious conduct causing "personal injury or death, or damage to or loss of property, occurring in the United States." 28 U.S.C. § 1605(a)(5). This exception does

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[3] In pertinent part, the FSIA, 28 U.S.C. 1605(a) provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> * * *
>
> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

not extend to all torts that "have had effects in the United States." Amerada Hess, 488 U.S. at 441. Rather, it "covers only torts occurring within the territorial jurisdiction of the United States." Ibid.

Both the statutory language and legislative history make clear that Congress did not intend to abrogate foreign states' immunity for such quintessentially sovereign acts as the exercise of prosecutorial discretion or the invocation of extradition treaties. See H.R. 1487, 94th Cong., 2d Sess., 7 (Sept. 9, 1976), reprinted in 5 U.S.C.C.A.N. 1976, 6604, 6605 ("restrictive" theory of sovereign immunity maintains immunity for "suits involving a foreign state's public acts (jure imperii)"). Although "cast in general terms as applying to all [non-commercial] tort actions for money damages," the exception provided for in paragraph (a)(5) was "directed primarily at the problem of traffic accidents." Id. at 20-21, reprinted in 5 U.S.C.C.A.N. 1976, 6604, 6619. Congress specifically limited the scope of paragraph (a)(5) by imposing two exceptions which preserve foreign state immunity with respect to "(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function" and "(B) any claim arising out of malicious prosecution, abuse of process ... [or] misrepresentation." 28 U.S.C. § 1605(a)(5)(A) & (B). As Congress noted, these exceptions "correspond to many of the claims with respect to which the U.S. Government retains immunity

under the Federal Tort Claims Act ["FTCA"], 28 U.S.C. 2680(a) and (h)." H.R. 1487, 94th Cong., 2d Sess., 7 (Sept. 9, 1976), reprinted in 5 U.S.C.C.A.N. 1976, 6604, 6605.

To the extent that plaintiffs' claims are based on conduct that occurred in the United States, and thus meet the threshold requirement of paragraph (a)(5), they are barred by the exceptions to that rule. Under the express language of (a)(5)(B), paragraph (a)(5) does not confer jurisdiction over Blaxland's first and second causes of action, which the Complaint characterizes as claims for "malicious prosecution" and "abuse of process." Amend. Compl. at 10, 12; 28 U.S.C. § 1605(a)(5)(B). Likewise, the Blaxlands cannot bring their claims for intentional infliction of emotional distress, false imprisonment, or loss of consortium under the non-commercial tort exception because these claims "aris[e] out of" Blaxland's claims for malicious prosecution and abuse of process. 28 U.S.C. § 1605(a)(5)(B).

This Court has made clear that a plaintiff cannot avoid a jurisdictional bar such as § 1605(a)(5)(B) simply by changing the name of his cause of action. See Thomas-Lazear v. FBI, 851 F.2d 1202, 1206-07 (9th Cir. 1988) (interpreting intentional tort exception to FTCA's waiver of immunity).[4] Instead, the Court

[4] Like § 1605(a)(5)(B), § 2680(h) of the FTCA preserves the United States' immunity for any claim "arising out of" certain intentional torts, including "malicious prosecution, abuse of process ... [and] misrepresentation." 28 U.S.C. § 2680(h). See also H.R. 1487, 94th Cong., 2d Sess., 7 (Sept. 9, 1976), reprinted in 5 U.S.C.C.A.N. 1976, 6604, 6605 (noting that § 1605(a)(5)(B) "correspond[s]" to § 2680(h)).

"looks beyond the labels used to determine whether a proposed claim is barred." Id. at 1207. See also Mt. Homes v. United States, 912 F.2d 352, 355 (9th Cir. 1990) (claim for failure to communicate correct sales tax information barred by FTCA because it was "in essence an action for negligent misrepresentation"); Leaf v. United States, 661 F.2d 740 (9th Cir. 1981) (plaintiff's "negligence" claim was barred by FTCA's misrepresentation exception because the alleged false representation was "within the chain of causative events upon which the plaintiff's claim is founded"). Thus, in Thomas-Lazear, the Court held that the plaintiff's claim for "negligent infliction of emotional distress" was precluded by the Federal Tort Claims Act's bar on claims "arising out of ... libel [or] slander." Ibid.; 28 U.S.C. § 2680(h). The Court reasoned that, because "the Government's actions that constitute a claim for slander are essential to Thomas-Lazear's claim for negligent infliction of emotional distress," the negligent infliction claim was also barred. Thomas-Lazear, 851 F.2d at 1207. See also ibid. (citing Metz v. United States, 788 F.2d 1528, 1535 (11th Cir. 1986) (concluding that intentional infliction of emotional distress claim was barred because there was no difference between the acts underlying it and plaintiff's claim for false arrest)).

Under the reasoning of Thomas-Lazear, plaintiffs' claims for intentional infliction, false imprisonment, and loss of consortium "arise out of" Blaxland's barred claims for malicious

prosecution and abuse of process. Plaintiffs' causes of action for intentional infliction, false imprisonment and loss of consortium simply "incorporate[] the allegations of all the other claims" by reference. See Amend. Compl. ¶¶ 57, 63, 69, 74; Thomas-Lazear, 851 F.2d at 1206. The accusations that Shaw and Barry supplied false and misleading information to the United States Attorney and district court – the central allegations of the malicious prosecution and abuse of process counts – "are essential to" plaintiffs' claims for false imprisonment, intentional infliction of emotional distress and loss of consortium. Thomas-Lazear, 851 F.2d at 1206. As in Thomas-Lazear, plaintiffs' intentional infliction, false imprisonment and loss of consortium causes of action are "nothing more than an effort to remove the damage element from [the malicious prosecution and abuse of process claims] and plead it separately" as a series of independent torts. Ibid. Indeed, the Complaint explicitly identifies Blaxland's imprisonment and separation from his wife and the attending emotional distress as the injury for which Blaxland seeks compensation in his malicious prosecution and abuse of process claims. Amend. Compl. ¶¶ 48-51, 53-55.

The conclusion that plaintiffs' claims fall outside the non-commercial tort exception is further supported by § 1650(a)(5)(A), which clarifies that paragraph (a)(5) does not extend to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function."

This provision reflects Congress's intent to abrogate foreign states' immunity only for "private acts" while preserving that immunity for "public acts." H.R. 1487, 94th Cong., 2d Sess., 7 (Sept. 9, 1976), reprinted in 5 U.S.C.C.A.N. 1976, 6604, 6605. The discretionary determination to pursue a prosecution or to invoke a treaty of extradition are core public acts for which Congress intended to preserve foreign governments' immunity. As the Supreme Court recognized in Saudi Arabia v. Nelson, 507 U.S. 349 (1993), the "[e]xercise of the powers of police and penal powers," including the "expulsion of an alien," are acts exclusively undertaken by states. Id. at 362. Even when abused, "a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory [of foreign sovereign immunity] as peculiarly sovereign in nature." Id. at 361. See also Herbage v. Meese, 747 F. Supp. 60, 62, 66-67 (D.D.C. 1990) (holding barred under the FSIA claims against British officials for carrying out extradition request based upon alleged perjury), aff'd, 946 F.2d 1564 (D.C. Cir. 1991). Cf. General Dynamics Corp. v. United States, 139 F.3d 1280, 1286 (9th Cir. 1998) (decision to prosecute protected by discretionary function exception to the FTCA).

C. Australia's Invocation Of Its Rights Under The Treaty Of Extradition With the United States Did Not Constitute A Waiver Of Australia's Immunity From Suit In U.S. Courts.

Plaintiffs' contention that the district court had jurisdiction under the waiver provision of 28 U.S.C. § 1605(a)(1)

also fails as a matter of law. Such an extension of paragraph (a)(1) would run directly contrary to Congress's specific determination in paragraph (a)(5) not to abrogate foreign states' immunity for claims of malicious prosecution and abuse of process.

The courts of appeals, including this Court, have consistently held that the waiver provision of paragraph (a)(1) should be "narrowly construed." Joseph v. Office of the Consulate General of Nigeria, 830 F.2d 1018, 1022 (9th Cir. 1987); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 243 (2d Cir. 1996); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir. 1985). In support of this conclusion, the courts have cited the narrow list of examples given by Congress in the legislative history of the implied waiver provision. Congress specifically referred to three circumstances that would constitute implied waivers – "where a foreign state has agreed to arbitration in another country," "where a foreign state has agreed that the law of a particular country should govern a contract," and "where a foreign state has filed a responsive pleading without raising the defense of sovereign immunity." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 18, reprinted in 1976 U.S.C.C.A.N. 6604, 6617. Although these examples are not exclusive, "courts have resisted expanding the scope of the implied waiver beyond these three

examples." Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect, 89 F.3d 650, 655 (9th Cir. 1996) ("Servicios Maritimos") (citing Frolova, 761 F.2d at 377); Joseph, 830 F.2d at 1022 ("[i]mplicit waivers are ordinarily found only" in the three circumstances cited by Congress).

The implied waiver provision cannot be construed in such a way as to conflict with Congress's determination in paragraph (a)(5) not to abrogate foreign governments' immunity for claims arising out of malicious prosecution and abuse of process. In paragraph (a)(5)(B), Congress explicitly preserved foreign sovereigns' immunity against allegations of malicious prosecution and abuse of process committed before courts in the United States.[5] Although (a)(5)(B) does not, by its own terms, prevent foreign states from consenting, under paragraph (a)(1), to U.S. jurisdiction over malicious prosecution claims, the express provisions of (a)(5)(B) do preclude a rule by which every claim for malicious prosecution or abuse of process that would be barred by (a)(5)(B) is converted ipso facto into a deemed waiver of immunity. In light of the express statement in paragraph (a)(5)(B) that foreign states will not be subject to malicious prosecution or abuse of process claims for their conduct before U.S. courts, the Court simply cannot find that Australia

[5] As noted above, paragraph (a)(5) applies only to torts committed within the United States. See Amerada Hess, 488 U.S. at 441. Thus, paragraph (a)(5)(B)'s reference to claims of malicious prosecution or abuse of process necessarily relates to alleged misconduct committed before courts in the United States.

knowingly waived its immunity to such claims when it invoked its rights under treaty to have Blaxland extradited.

Even apart from this conflict with paragraph (a)(5)(B), plaintiffs' implied waiver argument fails because plaintiffs' evidence does not support a conclusion that Australia waived its immunity knowingly and intentionally. The examples of implicit waiver listed by Congress in the statutory history reflect that an implied waiver of immunity should not be found "without strong evidence that this is what the foreign state intended." Servicios Maritimos, 89 F.3d at 655 (quoting, with emphasis, Rodriguez v. Transnave, Inc., 8 F.3d 284, 287 (5th Cir. 1993)). Other courts of appeals have similarly insisted upon a showing that the foreign sovereign intended to waive its immunity. Frolova, 761 F.2d at 378 ("waiver would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so" (emphasis added)); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994) ("the amici's jus cogens theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1)"); Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for Galadari, 12 F.3d 317, 326 (2d Cir. 1993) (waiver must be "unmistakable" and "unambiguous").

Applying this standard, this Court has refused to find intentional waivers in numerous cases under the FSIA. In Joseph,

the Nigerian Consulate had entered a lease agreement that specifically contemplated court litigation arising out of the agreement. 830 F.2d at 1022.[6] In light of this provision and the purely local nature of the contract the Court concluded that "it is virtually inconceivable that the Consulate contemplated that adjudication of disputes would occur in a court outside of the United States." Id. at 1022-23. Yet, despite this evidence, the Court was unwilling to rely solely upon the waiver exception, and, instead, relied upon the commercial activity exception to the FSIA. See id. at 1023 & n.6, 1024. In Servicios Maritimos, the state petroleum refinery of Mexico ("Pemex") intervened in litigation in the U.S. District Court to assert claims against the defendant petroleum tanker for conversion and several additional causes of action relating to defendant's contamination of and failure to deliver its cargo. 89 F.3d at 653. The defendant countersued, alleging breach of contract, fraud, and other claims relating to the same cargo. Ibid. Despite the fact that Pemex affirmatively had invoked the district court's jurisdiction to assert its own claims, this Court refused to find that Pemex had waived its immunity with respect to the counterclaims under the demanding standard required by 28 U.S.C. § 1605(a)(1). Id. at 655-56 ("aside from the fact that Pemex did

[6] The lease provided that "[i]n the event that any action shall be commenced ... concerning this lease ... then in addition to all other relief at law or equity, the prevailing party shall be entitled to recover attorney's fees as fixed by the court." Joseph, 830 F.2d at 1022 (emphasis added).

not assert its immunity in its complaint, there is no evidence to show that the immunity was intentionally waived").[7] See also Hilao v. Estate of Marcos, 94 F.3d 539, 547 (9th Cir. 1996) (refusing to find waiver of immunity by the Republic of Philippines from either its filing of an amicus brief in the litigation at issue or its filing of claims in U.S. court against the same assets sought by plaintiff).

There is even less evidence in this case of an intentional waiver than in Joseph, Servicios Maritimos, or Hilao. In all three of those cases the foreign state had evidenced a clear recognition that a U.S. court could or would exercise jurisdiction to adjudicate legal claims for money damages involving the foreign state. See Hilao, 94 F.3d at 547; Servicios Maritimos, 89 F.3d at 653; Joseph, 830 F.2d at 1022. Here, in contrast, Australia merely invoked its rights under a treaty of extradition to have Blaxland returned to Australia to stand trial before an Australian court. As this Court has explained, a U.S. court asked to grant extradition is not called upon to determine the merits of the criminal charge. See Mainero

[7] The Court concluded that the exercise of jurisdiction over certain claims was proper under a separate provision of the FSIA, 28 U.S.C. § 1607, in which Congress abrogated foreign states' immunity "with respect to any counterclaim ... arising out of the same transaction or occurrence that is the subject matter of the claim of the foreign state." See Servicios Maritimos, 89 F.3d at 656. The counterclaim provision of the FSIA is not implicated in this case, and was not relied upon by plaintiffs, because plaintiffs' claims are not asserted as counterclaims to an "action brought by a foreign state." 28 U.S.C. § 1607.

v. Gregg, 164 F.3d 1199, 1205 (9th Cir. 1999) (magistrate merely required to determine "probable cause" to sustain charge).

Plaintiffs base their argument entirely upon this Court's decision in Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992). Plaintiffs' reliance on Siderman is misplaced: that decision is distinguishable as a matter of both fact and law. In Siderman, plaintiff alleged that he had been tortured in Argentina. After Siderman fled that country, the Argentine government filed baseless criminal proceedings against him, and sent a letter rogatory to the Los Angeles Superior Court seeking its assistance in serving papers on Siderman, as part of Argentina's effort to have Siderman returned for further persecution. Id. at 703, 722. Siderman later sued Argentina for torture and expropriation of property. Id. at 704. This Court concluded that Siderman had presented sufficient evidence to support a finding that Argentina had implicitly waived its immunity by invoking the jurisdiction of the California court in its effort to persecute and torture Siderman. Id. at 722. The Court stated that a foreign state impliedly waives its immunity when there "exist[s] a direct connection between the sovereign's activities in our courts and the plaintiff's claims for relief." Ibid. The Court emphasized, however, that it was not holding that "any foreign sovereign which takes actions against a private

party in our courts necessarily opens the way to all manner of suit by that party." Ibid.

In clear distinction to this case, Siderman did not concern claims with respect to which Congress had specifically preserved a foreign state's immunity. In Siderman, the plaintiffs asserted claims arising out of torture and expropriation of property in Argentina. Id. at 704; Siderman de Blake v. Republic of Argentina, 1984 WL 9080 (C.D. Cal. Sept. 28, 1984). Thus, the Court did not address claims arising from tortious conduct that occurred in the United States or claims arising out of malicious prosecution or abuse of process. See Siderman, 965 F.2d at 714, 720 n.17. Indeed, the Court specifically noted that Siderman had not asserted jurisdiction based upon paragraph (a)(5). See ibid. Plaintiffs' proposed extension of Siderman to claims arising out of malicious prosecution and abuse of process – the filing of false statements – before a U.S. court is precluded by the plain language of paragraph (a)(5)(B), as explained above.

Further, extension of Siderman to this case would be inappropriate because it would, in effect, penalize Australia for doing no more than exercising its rights under a treaty with the United States. Under the Treaty of Extradition Between The United States of America and Australia of May 14, 1974, as amended by a Protocol signed September 4, 1990 (Extradition Treaty) (Addendum), Australia was required to, and did, make its

extradition request to the State Department. See Amend. Compl. ¶ 22; 1990 Protocol, Art. 7 ("All requests for extradition shall be made through the diplomatic channel."). The United States Attorney then filed the extradition request on Australia's behalf. In Siderman, by contrast, Argentina made its request for assistance directly to the Los Angeles Superior Court and does not appear to have acted under any treaty with the United States. 965 F.2d at 703.[8] Moreover, Australia was required under the Treaty to submit with the request "a description of the facts, by way of affidavit, statement, or declaration, setting forth reasonable grounds for believing that an offense has been committed and that the person sought committed it." 1990 Protocol, Art. 7(3)(c). If Siderman were extended to this case, then Australia, and presumably any other foreign state with whom the United States has a similar treaty of extradition, would be deemed to have waived its immunity from suit every time that it submits an extradition request and accompanying affidavits.

[8] The letter rogatory at issue in Siderman was issued in 1976. This was prior to the entry into force between the United States and Argentina of the Inter-American Convention on Letters Rogatory (the "Inter-American Convention"), which entered into force between the two nations on August 27, 1988. Nor, even if the Inter-American Convention had been in force in 1976, would it have extended to the letter rogatory at issue in Siderman, which was issued in connection with criminal proceedings. See Siderman, 965 F.2d at 703; Inter-American Convention, Art. 2. Counsel for the United States is aware of no other treaty then in force that would have governed the letter rogatory at issue in Siderman.

Such a ruling would significantly broaden the role of the U.S. courts with respect to foreign states' extradition requests. As this Court has frequently observed, in reviewing an extradition request, the judge's role is limited to determining whether (1) the crime is extraditable and (2) there is probable cause to sustain the charge. See, e.g., Mainero v. Gregg, 164 F.3d 1199, 1205 (9th Cir. 1999); Emami v. U.S. District Court, 834 F.2d 1444, 1447 (9th Cir. 1987); Quinn v. Robinson, 783 F.2d 776, 787 (9th Cir. 1986). On habeas review, the reviewing court's function is similarly limited. Mainero, 164 F.2d at 1205. Plaintiffs' suit seeks to circumvent these limitations by bringing what is in essence a collateral attack on Blaxland's extradition and trial. To entertain plaintiffs' suit would constitute a fundamental expansion of the role of the courts in the extraditing jurisdiction that would seriously impair the functioning of our extradition treaties and could result in foreign courts exercising jurisdiction over the United States whenever an extradited individual asserts that the basis for extradition was fabricated.

Because, as the Supreme Court has held, the FSIA is the exclusive basis for jurisdiction over a foreign sovereign, the ultimate question in this case is whether Congress intended that a foreign state's invocation of its rights under an extradition treaty would subject that state to claims in United States courts arising out of malicious prosecution and abuse of process. In

light of Congress's express preservation of foreign states' immunity from such claims in § 1605(a)(5)(B) and the foreign policy concerns such a rule would raise, the Court must conclude the Congress did not intend that Australia would be subject to suit in this case.

CONCLUSION

For the foregoing reasons, the Court should direct that the district court dismiss for lack of jurisdiction plaintiffs' claims against the Commonwealth of Australia, its agencies and instrumentalities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of December, 2000, I have dispatched via Federal Express, next business day delivery, an original and fifteen (15) copies, of the foregoing Brief for Amicus Curiae the United States of America to:

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I hereby certify that I have this 22nd day of December, 2000, served two(2) true and correct copies of the foregoing Brief for Amicus Curiae the United States of America via Federal Express, next business day delivery, properly addressed to the following:

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